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In The

Supreme Court of the United States

October Term, 1990

MICHAEL BARNES, Prosecuting Attorney
of St. Joseph County, Indiana, et al.,

Petitioners,

v.

GLEN THEATRE, INC., et al.; and
DARLENE MILLER, et al.,

Respondents.

On Writ Of Certiorari To The United States
Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENTS GLEN THEATRE, INC., GAYLE ANN MARIE SUTRO, AND CARLA JOHNSON

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QUESTIONS PRESENTED

1. Whether nude dancing, performed as entertainment indoors and before a willing adult audience, is expression entitled to First Amendment protection?

2. If nude dancing is protected expression under the First Amendment, is Indiana's general public indecency law unconstitutional as applied to such dancing?

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BRIEF FOR RESPONDENTS GLEN THEATRE, INC., GAYLE ANN MARIE SUTRO, AND CARLA JOHNSON

STATEMENT OF THE CASE

Respondents, Glen Theatre, Inc.,[1] Gayle Ann Marie Sutro, and Carla Johnson accept the Statement of the Case submitted by Petitioners subject to the following inaccuracies and/or omissions:

1. Respondent Sutro, in her affidavit submitted to the district court (J.A. 14), confirmed that she has "as an

[1] Respondent Glen Theatre, Inc. has no parent or subsidiary companies to list pursuant to Sup. Ct. R. 29.1.

integral part of [her] dance, removed [her] clothes and danced nude in an art form [she] considered to be artistic." (Clarification added).

2. Petitioners improperly state (Pet. Br. 5), when referencing the findings made by Judge Sharp on remand from the Seventh Circuit (*Glen Theatre, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986) (Pet. App. 140)), the following: "Based on the videotape and factual findings previously made in all three cases, the district court denied relief and entered judgment in favor of defendants." This is incorrect. Judge Sharp did *not* consider the evidence of *these* Respondents on remand, inasmuch as he had mistakenly dismissed the claims of these Respondents (predicated upon an erroneous finding of mootness) as part of his Memorandum and Order of September 9, 1988 (Pet. App. 120). This mistake was later corrected by a subsequent Memorandum and Order dated October 21, 1988 (Pet. App. 136), which, however, merely vacated the finding of mootness as to these Respondents, and ordered the judgment of September 9, 1988 (applicable to the claims of the Darlene Miller Respondents) to apply to the Glen Theatre Respondents as well (Pet. App. 139). No reference to any findings of fact relative to *these* Respondents was made by Judge Sharp in connection with the (apparent) directions of the Seventh Circuit, on remand.

3. The Petitioners incorrectly accuse the three judge Seventh Circuit panel in *Miller v. Civil City of South Bend*, 887 F.2d 826 (7th Cir. 1989) (Pet. App. 112), of having ignored the findings made by Judge Sharp that he had been (apparently) instructed to make. Pet. Br. at 7. Quite to the contrary, the Seventh Circuit, in *Miller*, 887 F.2d at 829, indicated that Judge Sharp had misread their previous instructions on remand; the appellate court having thought it appropriate for Judge Sharp to make the determination in the first instance as to whether or not the State of Indiana was seeking to prohibit nude dancing as entertainment, rather than making a qualitative judgment regarding the artistic merit or aesthetic appeal of any particular dance routine. This was the basis for the *Miller* panel's determination that the district court's determination in this regard was clearly erroneous.

SUMMARY OF ARGUMENT

I. This Court has long held that live entertainment falls within the ambit of the First Amendment. See *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), and cases cited therein. The specific type of entertainment involved in the instant matter, that being nude dancing occurring indoors before a willing adult audience, has implicitly been recognized by this Court to enjoy some constitutional protection. *Schad, supra*; See also White and Stevens dissenting from denial of certiorari in *Young v. Arkansas*, 474 U.S. 1070 (1985).

Dance performed as entertainment before an audience inherently conveys a message. It is one of sensuality and eroticism, seven of the judges (the majority) below had no problem discerning the particularized message contained in the strip-tease type nude dancing involved here. *Miller v. Civil City of South Bend*, 904 F.2d 1081 (7th Cir. 1990) (*En Banc*). The fact that the message may be one dealing with sex is further irrelevant, for sexual expression which is not obscene, *Miller v. California*, 413 U.S. 15 (1973), is still protected. *Sable Communications v. FCC.*, 492 U.S. ___, 106 L.Ed.2d 93 (1989).

The state's contentions that the activity involved here is *conduct*, not speech, must also necessarily fail. The "conduct" that the state seeks to regulate, (*nudity*), is inherently interwoven with the expressive activity (dance) and, indeed, is an integral part of the expressive activity such that the state's attempted regulation must be deemed to be directed at the speech itself.

Analysis of whether or not strip-tease type nude dancing is *expression* under the First Amendment pursuant to *Spence v. Washington*, 418 U.S. 405 (1974) is inappropriate. Such analysis is unnecessary when the activity is inherently expressive. *Ward v. Rock Against Racism*, 491 U.S. ___, 105 L.Ed.2d 661 (1989). The *Spence* analysis is used to handle those *arguable* situations where the activity is inherently *conduct* (such as symbolic political speech), yet asserted to be undertaken to convey a particularized message. This is not the case

here. In any event, even if applicable, these Respondents would fulfill the *Spence* requirements in that they expressed their intent to convey a message (of sensuality, allurement and excitement) in their inherently expressive "strip-tease" type performance dance, and that message is reasonably perceived by the audience. The district court below found such intent to exist in its findings of fact.

II. To uphold the constitutionality of the Indiana public indecency statute, as argued by the state, as being either a content-neutral time, place, or manner regulation, or as a facially neutral statute incidentally limiting First Amendment rights, is to effectively overrule a limiting construction given the statute by the Indiana Supreme Court in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1979) and *Dove v. Indiana*, 449 U.S. 806 (1980), which excluded from criminal proscription that nudity that is part of a larger form of expression where the communication of ideas is involved. This limiting construction was properly applied by the federal courts below. This Court has repeatedly acknowledged its responsibility to accept state judicial construction of state laws, *Shuttlesworth v. City of Birmingham*, 382 U.S. 87 (1965), and to also give deference to lower federal court constructional interpretation of state statutes. *Frisby v. Schultz*, 487 U.S. 450 (1988).

Under either of the aforesaid arguments proffered by the State of Indiana, each applies only where the underlying activity is deemed expression protected by the First Amendment. However, if Respondents' nude dancing is expression otherwise protected by the First Amendment, then Respondents' performances would properly qualify as the type of expression not proscribable pursuant to the limiting construction given the public indecency statute by the *Baysinger* court. For this Court to apply either of these tests would be to effectively void the limiting construction given the statute by the Indiana Supreme Court.

Additionally, such a ruling would effectively prohibit nude dancing at all times, in all circumstances throughout the entire State of Indiana, a circumstance which this Court has

already determined to be unconstitutionally overbroad. *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975).

Even assuming that either of the foregoing tests are applied by this Court, the statute at issue here, in any event, does not pass constitutional muster. It is not content-neutral. Content-neutral restrictions are those that are justified without reference to the content of the regulated speech. *Boos v. Barry*, 485 U.S. 312 (1988). The Indiana public indecency statute is directed at the content of expression, that being nudity, and, as construed in *Baysinger*, discriminates among nude dancing based upon content. Therefore it is content-specific, and must be evaluated pursuant to "strict scrutiny." Under such scrutiny, the statute fails to be constitutional as it is not necessary to a compelling governmental interest, and because there are less restrictive means available. *Perry Education Assn. v. Perry Local Educators Assn.*, 460 U.S. 37 (1983).

Even if the statute can be assumed to be content-neutral, it is not valid as a reasonable time, place or manner regulation as it is neither narrowly tailored nor leaves open alternate channels of communication. It is not narrowly tailored since the statute effectuates a total ban on all nudity. In addition, the nudity exceptions allowed not only under the state court's limiting construction in *Baysinger*, but also by the state's admittedly arbitrary enforcement of the statute, preclude any conclusion of narrow tailoring. Similarly, there are no "alternate means of communication" available since the statute results in a total ban of public nudity, in all places, at all times, and in all circumstances. Therefore, the statute fails under the intermediate level of scrutiny as well.

Nor is the statute justifiable as only incidentally impacting upon First Amendment speech. Those cases decided by this Court applying such a test have been limited to circumstances where the government was acting as a proprietor to manage its own property or internal operations. See, for example, *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). It is fallacious to argue that a total ban throughout the state of nudity has only an "incidental impact" on expression.

ARGUMENT

I.

PERFORMANCE DANCE[2] IS INHERENTLY "EXPRESSION" OF A TYPE PROTECTED BY THE FIRST AMENDMENT, WHICH PROTECTION IS NOT LOST BY THE INCLUSION OF NUDITY THEREIN.

A. HOW THE QUESTION OF WHETHER DANCE IS INHERENTLY "EXPRESSION" AROSE IN THIS CASE.

1. The State of Indiana decisions.

Understanding the development of Indiana case law applicable to the instant statute is germane to the consideration of the issues before this Court. Judge Posner's recitation in this regard is illuminating:

> An Indiana statute makes public indecency, including appearing nude in public, a crime. Ind. Code §35-45-4-1(a)(3). The normal operation of the statute is illustrated by *Elliott v. State*, 435 N.E.2d 302 (Ind. App. 3d Dist. 1982), where the defendant was convicted of urinating in public. However, in *State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580 (1979), appeal dismissed for want of a substantial federal question under the name *Clark v. Indiana*, 446 U.S. 931, 100 S. Ct. 2146, 64 L.Ed.2d 783 (1980) [and *Dove v. Indiana*, 449 U.S. 806 (1980)], the Indiana Supreme Court interpreted the statute to apply to nude entertainment in theaters, nightclubs, and other establishments open to the public. The interpretation was not inevitable. *State v. Brooks*, 275 Or. 171, 550 P.2d 440 (1976); compare *City of Chattanooga v. McCoy*, 645 S.W.2d 400, 401 (Tenn.

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[2] These Petitioners use the terminology "performance dance" to refer to any dance presentations performed as entertainment before a consenting adult audience. Since the intended performance by Respondent Gayle Sutro was not to occur in a "bar room", nor was it to include "table dancing" or any such like concepts, referring to the intended performances of these Respondents as nude "bar room" type dancing is inappropriate and misrepresentative of the actual circumstances.

> 1983). But, having been made, it induced the Indiana court in *Baysinger*, in an effort to save the constitutionality of the statute, to carve out an exception for performances having an expressive character. *That is how the issue of "expression" got into this case*. If the striptease dances that the plaintiffs want to put on for their customers are not expressive, then since at the end of the dances the dancers are nude, the statute makes the dances criminal.

Miller v. Civil City of South Bend, 904 F.2d 1081, 1090 (7th Cir. 1990) (*En Banc*) (Posner, J., concurring) (Pet. App. 19) (emphasis and clarification added).

Significant to the *Baysinger* court's determination was the following:

> Appellees make no claim that there is any pure speech involved in their appearances. *They make no claim that the expression of any ideas is involved or inhibited because of the restriction on nudity in a public place*. The injury claimed by the individual dancers and the owners and operators of the bars is that they lose money if unable to appear nude in public or to offer nude dancing in their establishments. They complain that they make less money appearing scantily clad than they make when they appear nude.

Baysinger, supra, 397 N.E.2d at 587. (Emphasis added).

Although the Appellees in *Baysinger*, (like all Respondents here), were engaging in nude dancing, the court determined their claim to be insufficient.

> This is a claim for some kind of a right to appear nude in public and in this context, to appear nude in public for money. This activity is conduct, not speech, and as such, *this claim* does not rise to the level of a First Amendment claim.

Id., at 587. (Emphasis added).

As the court stressed, "A critical part of the final issue to be decided relates to whether appearing nude or performing a nude dance *as presented in these cases* is simply conduct or is expression entitled to First Amendment protection." *Id.*, at

587 (emphasis added). There being no contention that speech or expression of any ideas was involved or inhibited, the activity was deemed to be conduct. On appeal to this Court, the matter was dismissed for want of a substantial federal question. *Clark* and *Dove, supra.*

The *Baysinger* court was implicitly recognizing this Court's prior determinations that the burden is initially on the individual to establish a threshold First Amendment claim.

> Although it is common to place the burden upon the government to justify impingements on First Amendment interests, it is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive. In the absence of a showing that such a rule is necessary to protect vital First Amendment interests, we decline to deviate from the general rule that one seeking relief bears the burden of demonstrating that he is entitled to.

Clark v. CCNV, 468 U.S. 288, 294 n. 5 (1984).

The *Baysinger* court did, however, in order to save the public indecency statute from a successful facial overbreadth attack, give the statute a limiting construction:

> There is no right to appear nude in public. *Rather, it may be constitutionally required to tolerate or to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved.*

Baysinger, supra, 397 N.E.2d at 587 (emphasis added).

Because of the central role that this construction plays in the analysis of the legal issues, *infra*, it will be hereinafter referred to as the "*Baysinger* exception" or "*Baysinger* limiting construction."

The *Baysinger* decision also did something else. In relying on their previous decision in *Peachey v. Boswell*, 240 Ind. 604, 167 N.E.2d 48 (1960), the Indiana Supreme Court indicated that the term "public place" as set forth in the public indecency statute clearly applied to "taverns and bars," and

that the phrase would generally apply to any areas " 'open to common and general use, participation, or enjoyment' of the public." *Baysinger, supra*, at 582-583. This construction was further extended by the Indiana Court of Appeals in *Adims v. State*, 461 N.E.2d 740 (Ind. App. 3d Dist. 1984), which concluded that a private viewing booth, such as exists on the business premises of Respondent Glen Theatre Inc., was a "public place" in consideration to the application of the public indecency statute.

Five years after *Baysinger*, the Indiana Court of Appeals, in *Erhardt v. State*, 463 N.E.2d 1121 (Ind. App. 3d Dist. 1984), reversed a conviction under the public indecency statute of a dancer who, as part of a "Miss Erotica of Fort Wayne" contest danced in two songs, the second of which was completed wearing only a g-string and scotch tape crisscrossed over her nipples. The appellate court, cognizant of the *Baysinger* limiting construction, determined however, that the statute "[d]oes not apply to activity such as the theatrical appearances involved herein, which may not be prohibited absent a finding of obscenity." *Id.*, at 1121.

The *Erhardt* court concluded:

> After considering all of the foregoing, we are constrained to conclude that non-obscene nude dancing performed in an enclosed theatre for the entertainment of the paying spectators, all as occurred here, is presumptively protected as expression under the First Amendment, and the state, by its evidence, established a prima facie case that Ms. Erhardt was acting lawfully.

Id., at 1126.

Erhardt and *Baysinger* can only be reconciled by recognition of the difference in the underlying factual scenario concerning "expression". In *Baysinger*, no claim of pure speech or expression of ideas was asserted to be involved or inhibited. The *Erhardt* court, however, found that the *state's evidence* established a "prima facie case", 463 N.E.2d at 1126, so that the Defendants activity fell within the *Baysinger* exception, thereby implicitly concluding (based on the record in front of it) that expression meriting protection existed.

Erhardt had not asserted, as did the Appellees in *Baysinger* (and the Miller Respondents here) that her performance was devoid of speech.

Had there been no further change in the judicial construction of the statute, this matter would probably not be in front of this Court today.

However, the Indiana Supreme Court, in a brief, one page opinion, reversed the Indiana Court of Appeals decision in *Erhardt*. Without any discussion of the constitutional issues involved, and with no more than a cursory reference that the *statute* had been upheld against constitutional attack in *Baysinger*, Erhardt's conviction was reinstated. *Erhardt v. State*, 468 N.E.2d 224 (Ind. 1984). By so doing, the Indiana Supreme Court ignored what it had previously considered to be apparently critical underlying evidence in *Baysinger*; that being the lack of any expressed intent to "communicate". Rather, by its ruling, the court implicitly held that nude dancing is only *conduct*, devoid of sufficient "*expression*" so as to bring it within the *Baysinger* exception.[3] That is how the issue of "expression" got into this case.[4]

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[3] While it may appear that the Indiana Supreme Court's decision *Erhardt* did not necessarily address the constitutional issue, due to its statement that the dissenting opinion of Judge Connor in the *Erhardt* appellate court decision was "correct in every respect", 468 N.E.2d at 225 (which dissenting opinion perceived the evidence to be sufficient, under appellate standards of review to convict and further asserted that the First Amendment challenge had been waived, *Erhardt*, 463 N.E.2d at 1127), the last two paragraphs of the majority opinion directly refer to Erhardt's activity as "conduct" that squarely falls within the statute's proscription.

[4] Indeed, it is this *sole issue* (whether or not nude performance dance is "expression") that was raised in and addressed by the federal courts below. This is well illustrated by the remand of the initial Seventh Circuit decision, *Glen Theatres, Inc. v. Pearson*, 802 F.2d 287 (7th Cir. 1986), (Pet. App. 140) to allow the district court to determine whether the performance dance at issue was expressive conduct. "Plaintiffs are free to pursue their argument in district court that the nude dancing they wish to perform is expressive activity protected by the First Amendment *and outside the reach of the public nudity statute as construed by Baysinger*." *Id.*, at 290 (Pet. App. 146) (emphasis added). See, also, *Glen Theatre, Inc. v. Civil City of South Bend*, 695 F.Supp. 414, 418 (N.D. Ind. 1988)

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2. The facts relevant to these Respondents.

It is uncontested that the Chippewa Bookstore (Glen Theatre's business premises) neither sold nor permitted consumption of alcoholic beverages on its business premises (J.A. 15), that no accidental viewing by any non-consenting member of the public of any nude entertainment is possible at its premises (J.A. 16), that Respondent Sutro affirmatively asserted that her dance performances are an attempt to communicate as well as to entertain (J.A. 14), and that as an integral part of such routines, she removes her clothes and dances nude (J.A. 14). In addition, there has never been any contention by the state that the dance performances at issue were, or would be obscene (Pet. App. 154 n. 3). Based on the foregoing, the circumstances of these Respondents and those of JR's Kitty Kat Lounge and Darlene Miller differ in two material specific respects.

First, Glen Theatre does not sell or permit consumption of alcoholic beverages on its premises. If and to the extent that the Petitioners now assert, or this Court concludes, *sua sponte*, that the Twenty-First Amendment provides sufficient authority to uphold the statute, *California v. La Rue*, 409 U.S. 109 (1972), such analysis is inapplicable to the "*as applied*" challenge by these Respondents. See Section II(E), *infra*.

Second, and perhaps more importantly, Respondent Sutro's intended performances were specifically and *affirmatively asserted* to be an attempt to communicate as well as to entertain, with the nudity included therein being an integral part of her performances. Unlike Darlene Miller and JR's

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(Pet. App. 128-129), upon remand ["There is nothing left for this court to decide but whether the nudity in question is expressive activity protected by the First Amendment."] If not explicit, it was at least implicit in these decisions that if the questioned performance dance was "expression", that conduct fell within the *Baysinger* exception, and that the public indecency statute could not, therefore, constitutionally be applied in these circumstances. Any other arguments raised by the Petitioners at this point, are, for this reason, irrelevant.

Kitty Kat Lounge,[5] these Respondents do not contend that there is no communicative element to be expressed by Sutro's intended performances, and, in fact, assert quite to the contrary. This distinction may very well be one of constitutional proportions, given the obligations of a claimant to initially demonstrate First Amendment applicability.[6] See also discussion in Section II, *infra*.

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[5] The district court found that "the avowed purpose of her dance is to try to get customers to like her so that they will buy more drinks later," and determined that "Ms. Miller wants to dance nude because she believes she would make more money doing so . . . ". 695 F.Supp. at 420 (Pet. App. 133). Additionally, Miller's counsel, at oral arguments before the En Banc panel below asserted: "[T]here is not a larger political or ideological statement being made. I do not contend for a second that that is true. . . . I do not contend that there is some idea being expressed. We have said that in keeping with the language of the United States Supreme Court in *Schad* [*v. Borough of Mount Ephraim*, 452 U.S. 61 (1981)], that entertainment as well as political and ideological speech enjoys First Amendment protection. That's all we have ever said." 904 F.2d at 1116, 1123 (clarification added) (Pet. App. 71, 85).

[6] If the arguments of the dissenters in the Seventh Circuit *En Banc* decision below are accepted, and, in particular, the reasoning of Judge Easterbrook, then this distinction is one of critical importance, for Judge Easterbrook's reasoning is, to a large extent, predicated upon the Miller Respondents' affirmative assertion of the lack of any intended expression. For example, Judge Easterbrook argues that: "[t]he state's burden is especially light because the plaintiffs do not seek to transmit *any* message." *Miller* (*En Banc*), *supra*, 904 F.2d, 1081, 1120 (Easterbrook, J., dissenting). He further points out: "The district court found that the dancers are not trying to express an idea; *the dancers agree*." *Id.*, at 1125 (emphasis added). Judge Easterbrook concludes, at page 1128, that "[c]onduct gets to be 'otherwise protected', however, by having an element of 'expression' ". Demonstrating the importance that the lack of intent to "express" plays in his analysis, Judge Easterbrook goes on to state that "[t]hese principles do not aid the plaintiffs today, however, for they have not established that they are engaged in 'expression' ". *Id.*, at 1128. As to Petitioners Gayle Sutro and Glen Theatre, this is not so. And it is of no moment, however, that these Petitioners did not state (they were not asked, nor did it arise as an issue in the district court) exactly what this "expression" was. A message of sensuality and sexuality is obvious, as is demonstrated by the fact that it was readily perceived by seven judges of the Seventh Circuit. Certainly, Judge Easterbrook's analysis in his dissent does not turn upon "what" the message was, but rather what he perceives to be the lack of an intent to convey any message.

In any event, these Respondents did assert the existence of an intent to communicate and entertain through performance dance, which includes, as an integral part thereof, nudity. Accordingly, even under Judge Easterbrook's analysis in dissent in the Seventh Circuit below (n. 6, *supra*), the performances are entitled to First Amendment protection.[7]

B. PERFORMANCE DANCE IS INHERENTLY "EXPRESSIVE".

1. Prior decisions of this Court.

There is little room for doubt that under current precedent of this Court, performance dance is protected by the First Amendment, particularly when occurring indoors before a consenting adult audience. Loyalty to prior pronouncements, and a logical application of the underlying constitutional principles, makes this conclusion inescapable.

> Entertainment, as well as political and ideological speech, is protected; motion pictures, programs broadcast by radio and television, *and live entertainment*, such as musical and dramatic works, fall within the First Amendment guarantee. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Schacht v. United States*, 398 U.S. 58 (1970); *Jenkins v. Georgia*, 418 U.S. 153 (1974); *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975); *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Doran v. Salem Inn, Inc.*, 422 U.S. 922 (1975). See also *California v. La Rue*, 409 U.S. 109,

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[7] The distinctions between the positions taken by these Respondents and the Darlene Miller Respondents emphasize the concerns noted by Judge Easterbrook. While the Respondents here, through Gayle Sutro's affidavit, specifically asserted that nudity was an integral part of her expressive dance performances, Darlene Miller merely testified that her nudity was an effort to make more money. This distinction may be of critical constitutional importance when determining whether the *nudity* aspect of a particular dance performance may be regulated (or even precluded) based upon not only an asserted governmental interest, but also upon the importance of the nudity to the mode, or more importantly, the content of the expression.

118 (1972); *Young v. American Mini Theatres, Inc.* [427 U.S. 50, 61, 62 (1976)].

Schad, supra, at 65 (emphasis and clarification added).

Entertainment is so protected because the "line between the informing and the entertaining is too elusive" for demarcating First Amendment protections. *Winters v. New York*, 333 U.S. 507, 510 (1948).

While admittedly never directly so stating (see *Young v. Arkansas*, 474 U.S. 1070 (1985), White and Stevens, dissenting from denial of Certiorari), this Court's holdings in *La Rue, Doran, Schad* and *New York State Liquor Authorities v. Bellanca*, 452 U.S. 714 (1981), were undeniably premised upon the foundational supposition that at least some of the nude dancing that was sought to be proscribed in each of these cases enjoyed constitutional protection. For example, in *La Rue*, this Court need not have ever considered whether the state's rights under the Twenty-First Amendment outweighed the First Amendment concerns in question. If no First Amendment rights existed, the state's inherent police power would have been sufficient to justify the proscription. This interpretation of Supreme Court precedent (that nude dancing does enjoy some constitutional protection) has repeatedly and consistently been recognized by federal and state courts.[8] In fact,

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[8] A synopsis of the legal status of nude dancing in the various jurisdictions across the United States is found at 49 A.L.R. 3d 1084 (1973). As a partial list supporting the constitutional protections of nude or semi-nude performance dance, see, for example, the federal appellate decisions of *International Food and Beverage System v. Ft. Lauderdale*, 794 F.2d 1520 (11th Cir. 1986); *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986); *BSA, Inc. v. King County*, 804 F.2d 1104 (9th Cir. 1986); *Salem Inn, Inc. v. Frank*, 501 F.2d 18, 21 n. 3 (2d Cir. 1974), *aff'd in part*, 422 U.S. 922 (1975). Illustrative of state court holdings are *Mickens v. City of Kodiak*, 640 P.2d 818 (Alaska. 1982); *Moody v. Board of County Commissioners*, 237 Kan. 67, 697 P.2d 1310, 1316 (1985); *Morris v. Municipal Court*, 186 Cal. Rptr. 494, 652 P.2d 51 (1982); *Commonwealth v. Sees*, 374 Mass. 532, 373 N.E.2d 1151 (1978); *Koppinger v. City of Fairmont*, 311 Minn. 186, 248 N.W.2d 708 (1976); *State v. Brooks*, 275 Or. 171, 550 P.2d 440, 442-443 (1976); and *City of Chicago v. Hanson*, 105 Ill. App. 3d 1017, 435 N.E.2d 120, 123 (1982), *cert. denied*. In addition, the contemporary legal commentary is in accord with *Schad*

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the Seventh Circuit, prior to the decision now at issue, concluded that "entertainment that falls short of anyone's idea of 'art,' " *including "topless dancing"*, is protected under the First Amendment unless the "artistic expression is obscene in the legal sense." *Piarowski v. Illinois Community College District 515*, 759 F.2d 625, 628 (7th Cir. 1985), *cert. denied*, 474 U.S. 1007 (1985) (emphasis added).

To now hold that performance dance which includes nudity is not protected expression would be an anomaly, and would undermine not only the basic premise inherent in numerous previous decisions of this Court, but would serve to reverse a large number of properly decided federal and state appellate decisions.

The determination below by the Seventh Circuit that " . . . dance as entertainment is a form of conduct that is inherently expressive", *Miller* (*En Banc*), *supra*, 904 F.2d at 1085 (Pet. App. 9), is indeed the only logical conclusion that can be reached. The evolution of dance, both globally and in western culture, its relationship to religion, and its well chronicled history as a medium of expression, amply demonstrates this rather self-evident point. See 904 F.2d at 1083,

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that non-obscene nude performance dance merits constitutional protection. See the compilation prepared by the Seventh Circuit majority below, 904 F.2d at 1087 (Pet. App. 13).

Amici State of Arizona, et al., assert, however, without citations, that the state supreme courts of "Arkansas, Florida, Indiana, Louisiana, Maine, Michigan, Nebraska, Oregon and Tennessee" have concluded that " 'nude dancing' of the variety at issue in this case – 'barroom,' 'go-go', 'strip-tease' – is not protected" by the First Amendment. Br. 8 and n. 1. This is not only a blatant misrepresentation of the holdings of the various cases in those jurisdictions, but also ignores subsequent decisions of those states' appellate courts. For a full recitation as to the current status of the law in those jurisdictions, see the Br. in Opp. to Pet. for Cert. of Resp. Glen Theatre, Inc., et al., at 15-25.

Finally, the state argues that there are 22 state statutes where the offense of public indecency does not require that the victim be offended or unconsenting. Pet. Br. 34 n. 12, citing Pet. for Cert. at 13 n. 6. Most of those statutes are either distinguishable, or have received limiting constructions by state or federal courts so as not to apply to the nude performance dance here at issue. See Br. in Opp. to Pet. for Cert. of Resp. Glen Theatre, Inc., et al., at 9-13, esp. n.'s 5, 6 and 7.

1089-1090 (Pet. App. 5, 17-18). See also, Martin, J., *Introduction to the Dance* (1939); Clarke and Crisp, *The History of Dance* (1981).

As Alexander Bland observed,

> It is the perfect synthesis of abstract and human, of mind and intellect and emotion, discipline and spontaneity, spirituality and sex-appeal to which dancing aspires; *and in dance-as-communication, which is my concern here*, it is the most vivid presentation of this act of fusion which represents the ideal performance.
>
> There are many ways of stalking this ideal, as history shows. With slow or sudden shifts in the nature of society or conditions, different emphases are laid on different ingredients. As dancing (like sport) has changed from a participatory to a spectator experience, new expedients have been devised to intensify the communication between performers and audience, ranging from sheer weight of numbers to gymnastic virtuosities, from novel staging to unusual accompaniment. But the basic appeal remains the same – *the transmission of a state of awe and excitement (whether exhilarating, emotionally moving or simply aesthetic) from performer to spectator.*
>
> The difficulty of defining this experience explains the complexity of the qualities needed to produce it. An audience can be set on fire by spectacle or histrionics, by skill or explosive energy, by graceful lyricism or boisterous comedy. It can be stirred by unusual arrangements of steps or figures, by the physical beauty of the dancers or by dramatic stage devices. It can be stimulated by originality or delighted by the familiar. *The effect may be dominated by the choreographer, the designer, the musician or the dancer. In the long run it is the last who counts most.*

Bland, A., *A History of Ballet and Dance in the Western World*, (1976), at pages 10-11 (emphasis added).

When most recently analyzing the applicability of constitutional protections to rock music, this Court had no difficulty in recognizing its inherent expression:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to *appeal to the intellect and to the emotions*, and have censored musical compositions to serve the needs of the state. [T]he Constitution prohibits any like attempts in our own legal order.

Ward v. Rock Against Racism, supra, 674 (emphasis added, citations omitted).

Parallel observations made by the majority and concurring opinions here below well illustrate the inherent expressive nature of dance. Judge Flaum observed that "dance as entertainment is one of the earliest forms of expression known to man," citing to both its historical and biblical roots. He continued:

> Dance has been defined as "the art of moving the body in a rhythmical way, usually to music, to *express an emotion or idea*, to narrate a story, or simply to take delight in the movement itself." [I]nherently, it is the *communication of emotion or ideas*. At the route of all '[t]he very manifestations of dancing . . . lies the common impulse to resort to movement to externalize states *which we cannot externalize by rational means*. This is basic dance."

Miller (*En Banc*), *supra*, at 1085 (Pet. App. 9) (emphasis added) (citations omitted).

Judge Posner, in his concurrence, agreed with this position:

> Dance, as Judge Flaum emphasizes with pertinent references, is a medium of expression, of communication. What it expresses, what it communicates, is, like most art – particularly but not only nonverbal art – *emotion*, or more precisely an ordering of sights and sounds that arouses emotion.

Id., at 1091 (Pet. App. 20-21) (emphasis added). Dance, like the music in *Ward*, has the same "capacity to appeal to the intellect and to the emotions," and is, similarly, inherently expressive.

The dissenters are critical of the majority's finding of "expression" to inherently exist in "nude dancing" of the type involved here. Such a conclusion, these Respondents contend, is no more than a judicial attempt to distinguish "good" art from "bad", as demonstrated by Judge Easterbrook's demarcation between Mozart's music and a humpback whale's song by characterizing the former as "profound", defined as being "marked by intellectual depth."[9] 904 F.2d at 1081, 1125-26 (Pet. App. 90). As noted by Mr. Justice Harlan in *Cohen v California*, 403 U.S. 15 (1971):

> Indeed, we think it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id., at 25.

Certainly, the application of the First Amendment to art does not, and cannot turn upon whether or not federal judges are unable to discern or particularize a specific message.[10] Indeed, numerous ballet performances and modern dance recitals contain no discernable plot or specific message, yet to contend that they do not "communicate" defies credulity. As further noted by Justice Harlan:

> We cannot sanction the view that the Constitution, while solicitous of the cognitive content of individual speech, has little or no regard for that emotive function which, practically speaking, may often be

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[9] Websters New World Dictionary 1135 (2d ed. 1970)

[10] Judge Flaum, writing for the majority below, had the following to say regarding Judge Easterbrook's analysis in this regard: "Any attempt to distinguish 'high' art from 'low' entertainment based solely on the advancement of intellectual ideas must necessarily fail. Judge Easterbrook contends in dissent that music and ballet are protected because music appeals to the intellect and ballet tells stories, whereas nude dancing offers neither. Dissent at [904 F.2d 1124 (Pet. App. 87)]. Not all ballet tells stories, however, and not all music appeals to the intellect. The art/entertainment distinction would remove the shield of the first amendment from many forms of nonverbal art because they fail to communicate a defined intellectual thought; this attempted demarcation would leave them essentially unprotected." *Miller* (*En Banc*), *supra*, at 1086 (Pet. App. 10) (clarification added).

> the more important element of the overall message sought to be communicated.

Cohen, *supra*, at 26.

2. *Speech* versus *Conduct*.

The speech versus conduct dichotomy is, indeed, a difficult one, made so necessarily by the fact that all speech is inherently conduct in some form, and in all conduct, "[i]t is possible to find some kernel of expression . . . ". *City of Dallas v. Stanglin*, 490 U.S. ___, 104 L.Ed.2d 18, 25 (1989).[11] As observed by the Ninth Circuit, "[w]e are troubled by the special dangers involved in applying the speech/conduct distinction to theatrical productions or stage performances." *Chase v. Davelaar*, 645 F.2d 735 n. 12 (9th Cir. 1981).[12]

Certainly, even the dissenters below do not contend that dance is never speech protected by the First Amendment. They appear to argue that because the dance here includes nudity, and further that because the apparent message is [to them] exclusively one of sexual dimensions, it does not rise to

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[11] This is not, however, the circumstance that this Court faced in *Stanglin*. The issue in *Stanglin* was whether "recreational dancing" was protected conduct under a general "right of association" recognized to exist in the First Amendment. *Stanglin*, *supra*, 104 L.Ed.2d at 25-26. This Court, quite properly, concluded that *recreational dancing* qualified neither as a form of " 'intimate association' nor as a form of 'expressive association' as those terms were described in *Roberts* [*v. United States Jaycees*, 468 U.S. 609 (1984)]." *Stanglin*, *supra*, 104 L.Ed.2d, at 26 (clarification added). This case raises no such "associational" rights. At issue here is the consideration of the expressive nature of *entertainment*, conducted by a *performer* before a willing *audience*, which, simply, did not exist in the *Stanglin* circumstances.

[12] The Ninth Circuit elaborated: "We are hesitant to rely uncritically on the speech/conduct dichotomy. In part, our hesitancy arises from the conceptual weakness of the distinction. 'Speech' – communication of ideas or attitudes – is itself a form of 'conduct.' . . . In part, we are hesitant because what would ordinarily be called 'speech' may not be 'speech' for First Amendment purposes – e.g., obscenity, *Miller v. California*, 413 U.S. 15, 23 (1973) – whereas what would ordinarily be classified as 'conduct' may well be treated as protective 'speech' – e.g., wearing a protest armband, *Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969)." *Chase*, *supra*, at 793 n. 12. (Citations and parallel citations omitted).

the level of protected artistic merit. This is a puzzling position, however, given this Court's repeated indications that nudity does not place otherwise protected expression outside of the mantle of the First Amendment, *Schad, supra*, at 66, and that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." *Sable Communications v. F.C.C.*, 492 U.S. ___, 106 L.Ed.2d 93, 105 (1989).

The dissenters' position is even more puzzling given that as to Respondent Gayle Sutro, they did not even see her dance performance. Sutro did not submit a videotape demonstration of her dance. The observations made by the Massachusetts Supreme Judicial Court in *Commonwealth v. Sees, supra*, are apropos:

> So far as the record before us discloses, the dancer may have been rendering a selection from the "Ballet Africains" or some other work of unquestionable artistic and socially redeeming significance. Though not shown by proof, it seems more likely that she was engaged in "the customary 'barroom' type of nude dancing," involving "only the barest minimum of protected expression." To distinguish between the two, however, would be to cast on the police and courts "the anomalous duty of serving as . . . artistic constables," evaluating the artistic worth and tasteful quality of the performance in its total context. No governmental interest is shown to warrant the effort.

Id., at 1155 (citations omitted).

Indeed, it would seem inappropriate to require trial courts to review each and every distinct dance performance, in order to determine whether they contained sufficient expressive elements to merit constitutional protections. For example, if this Court finds the dance performances as represented by the Miller Respondents' videotape (J.A. Supp.) to be constitutionally protected expression, by requiring courts to make a case by case analysis of whether constitutional protections attach to any dance performance, it could easily be argued that if the dancers at JR's Kitty Kat Lounge deviate from the performances as contained in the videotape *in the slightest respect*, further court intervention will be necessary

to ascertain whether First Amendment protections no longer attach, merely on the basis of the deviation in performance.

In this regard, this Court should take notice of what occurred here below. When the Seventh Circuit remanded this action back to the district court for consideration of the issue of whether the asserted dance performances "should be afforded First Amendment protection," 802 F.2d at 291, the district court judge took that direction quite literally, and believed that he was required to actually view the intended performance. However, as noted by the Seventh Circuit (vacated in *Miller (En Banc)*, *supra*) following the district court's review of the evidence:

> When a court grapples with a delicate and emotionally charged issue, sometimes, unavoidably, an unintended ambiguity may find its way into an opinion. A careful reading of the opinion, however, ordinarily will clarify any questions. In this case, although we might have been more precise in our instruction on remand and substituted words "activity they wish to engage in" for "dancing they wish to perform," on the whole we believe our guidelines were misread. As we explained in *Glen Theatre*, the case law points to the conclusion that non-obscene nude dancing as entertainment is a form of expression entitled to limited first amendment protection. *Given the posture of the case, however, we thought it appropriate that the district court make the initial determination of whether the State of Indiana was, in fact, seeking to enforce its statute to prohibit nude dancing as entertainment, and thus limit plaintiffs expression. We did not intend for the district court to make a qualitative judgment as to the aesthetic appeal of artistic merit of a particular dance routine.*

887 F.2d, at 826 (Pet. App. 112) (emphasis added).

This observation by the Seventh Circuit is correct, and the only true issue to be addressed should be whether *performance dance* is inherently expressive; not whether any particular dance routine may be. Once it is acknowledged that

performance dance is inherently expressive, the First Amendment limits the government's ability to preclude such expression.

For example, this Court has already set forth a standard by which to judge when sexual expression loses its protective qualities. *Miller v. California, supra.* In any event, looking at this case from a perspective which focuses on the sexual aspect of the expression does an injustice to dance as a form of art. It would certainly surprise many of those self proclaimed elite to find that the multitude of modern dance and ballet companies touring this country, whose performances have no scripted plot nor verbalization, yet include both partial and total nudity, are devoid of any protection of the First Amendment.[13]

Establishing a concrete test to distinguish speech versus conduct when dealing with the arts is unnecessary to a resolution of this case. All that is required is the determination that non-obscene performance dance falls on the protected side of the intangible line. Such a conclusion, these Respondents contend is unavoidable. Any other conclusion would be "[i]ndefensible and a threat to our artistic freedom".[14] *Miller* (*En Banc*), *supra*, at 1090 (Pet. App. 18) (Posner, J., concurring).

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[13] Examples of dance companies which perform in America abstract content ("plotless") dance with nudity, which under the Indiana public nudity statute is proscribable, include: Bill T. Jones/Arnie Zane Co. – at present on tour of 22 U.S. cities including some in the Midwest, (one piece is "52 Handsome Nudes" which has 52 nudes on stage); Paul Taylor Co. (New York); Endangered Species Co. (New York); Carbone 14 (Canada); Mark Morris (New York); John Kelly (New York); Jennifer Monson Co. (New York); Ann Carlson Co. (New York); Ellen Fisher; Eric Ryan; Jennifer Miller/Susan Seizer; Pilobolus Dance Theatre (New York); Netherlands Dance Theatre (New York); Folies Bergere (Paris); Anna Halprin Co. (San Francisco); Martha Graham Dance Co. (New York); Susan Marshall Dance Co. (New York); Martha Clark Groups (New York); Garth Fagan Bucket Dance Theatre (New York).

[14] Judge Posner was referring to the finding by the district judge that the striptease dances concerned were " . . . [n]ot expressive activity," but "mere conduct," *Miller* (*En Banc*), *supra*, 904 F.2d at 1090. (Pet. App. 18).

C. NUDITY, AS AN INTEGRAL PART OF 'PERFORMANCE DANCE' DOES NOT RESULT IN A REMOVAL OF CONSTITUTIONAL PROTECTION.

> *The noblest in art is the nude.* This truth is recognized by all, and followed by painters, sculptors and poets; only the dancer has forgotten it, who should most remember it, *as the instrument of art is the human body itself.*

Duncan, I., *The Art of the Dance*, quoted in *The Art of the Dance*, edited by Cheney, S. (1969) p. 38 (emphasis added).[15]

Eroticism and nudity as an integral part of dance has a history that dates back to the beginning of dance itself. See generally, Cheshire, *Eroticism in the Performing Arts* in Webb, *The Erotic Arts*, 297 – 306 (rev. ed. 1983); Marks, J., *A Pictorial History of the Dance* (1962).

The fact that in the intended performance dance at issue here, and as an integral part of the dancer's expression, nudity occurs, has been repeatedly recognized by this Court to be of no moment to the protection which otherwise applies. "[N]udity alone does not place otherwise protected material

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[15] Isadora Duncan went on to express in this article at 43-44:

> Dancing expresses in a different language, different from nature, the beauty of the body; and the body grows more beautiful with dancing. All the conscious art of mankind has grown out of the discovery of the natural beauty of the human body. Men try to reproduce it in sand or on a wall, and painting thus was born. From our understanding of the harmonies and proportions of the members of the body sprang architecture. From the wish to glorify the body sculpture was created. The beauty of the human form is not chance. One cannot change it by dress. The Chinese women deformed their feet with tiny shoes; women of the time of Louis the XIV deformed their bodies with corsets; but the ideal of the human body must forever remain the same. The Venus "of" Milo stands on her pedestal in the Louvre for an ideal; women pass before her, hurt and deformed by the dress of ridiculous fashion. Yet she remains forever the same, for she is beauty, life, truth. It is because the human form is not and cannot be at the mercy of fashion or the taste of an epoch that the beauty of woman is eternal. She is the guide of human evolution toward the goal of human race; toward the ideal of the future which dreams of becoming God.

outside the mantle of the First Amendment." *Schad, supra*, at page 66, citing *Jenkins, supra*. "Furthermore, as the [circuit] court in this case recognized, nude dancing is not without its First Amendment protections from official regulation." *Schad, supra*, at 66, citing *Doran, supra*; *Southeastern Promotions, supra*; *California v. La Rue, supra*.

The State of Indiana seeks to prohibit an entertainment program merely because it includes "nudity". *Schad* makes it clear that such a prohibition is violative of the First Amendment.

As recognized by Judge Flaum, writing for the majority below, this Court's decisions in *La Rue*, and *Doran* "[c]an be reconciled only on the implicit assumption that the regulated activity, topless dancing, was protected by the First Amendment. Otherwise, the State's police power would be sufficient to support the statute in both cases." *Miller (En Banc), supra*, 904 F.2d. at 1083 (Pet. App. 5).

Performance dance is unquestionably expressive. The expression is the type of speech that is protected by the First Amendment. That protection is not lost simply because the performance includes nudity. The conclusion becomes inescapable, therefore, that the Indiana public indecency statute is unconstitutional as applied to nude dancing.

D. CONSTITUTIONAL PROTECTION OF PERFORMANCE DANCE, MUSIC, ABSTRACT ART, ETC. CANNOT BE MADE TO DEPEND UPON WHETHER SUCH EXPRESSION EVIDENCES A "PARTICULARIZED MESSAGE" REASONABLY LIKELY TO "BE UNDERSTOOD."

1. *Spence* and *Johnson* analysis does not apply.

The state asserts that pursuant to this Court's decisions in *Spence v. Washington, supra*, and *Texas v. Johnson*, 491 U.S. ___, 105 L.Ed.2d 342 (1989), the activity at issue (nude/semi-nude performance dance) is not imbued with sufficient communicative elements to bring it within the ambit of the First Amendment, unless there is an "intent to convey a particularized message" and a great likelihood that "the message

would be understood by those who viewed it." *Johnson, supra*, 105 L.Ed.2d at 353, citing *Spence, supra*, at 410-411. However, the state has cited to not a single decision of this Court that has applied this test to the arts, as opposed to alleged 'symbolic speech' that is otherwise inherently pure conduct.

The application of *Spence* has been limited to those circumstances where activity, which is inherently conduct *only*, is asserted to be occurring in a context in which the activity itself is the speech. By use of the test, courts are able to determine whether or not such conduct, given the "[f]actual context and environment in which it was undertaken," *Spence, supra*, at 410, was sufficiently infused with expression so as to conclude that it was "speech," thus bringing it to the threshold level of applying First Amendment analysis to the review of the proscription. It is the initial threshold inquiry "[t]o determine whether [the individuals] activity was sufficiently imbued with elements of communication to fall within the scope of the first and fourteenth amendments." *Spence, supra*, at 409 (clarification added).

This is so because "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea." *Id.*, at 409, citing from *United States v. O'Brien*, 391 U.S. 367, 376 (1968) (clarification in original).

The rule laid out in *Spence* and *Johnson* is used to handle those "arguable" situations where the activity is inherently "conduct", yet asserted to be undertaken to convey a particularized message. No such analysis is either necessary or appropriate when the activity (here, erotic dance) is inherently expressive. See *Ward, supra*.

To argue, as the state does, that there was no attempt to communicate nor that there was any "particularized message," misses the point by attempting to mechanically analyze the communicative element, for " . . . [a]rt is not to be understood, as we use the term, but is to be *experienced*." Graham, Martha, *A Modern Dancer's Primer for Action* (1941), as quoted in *Dance: A Basic Educational Technique*, edited by Rogers, F. (1980) (emphasis added).

> In its essentials, dance is the same over the entire world. The essentials are its function, which is communication; its instrument, which is the body; and its medium, which is movement.
> * * *
> No art ignores human values, for therein lie its roots. Directed by the authentic or perverted magnificence, which is man's spirit, movement is the most powerful and dangerous art medium known. This is because it is the speech of the basic instrument, the body, which is an instinctive, intuitive, and inevitable mirror revealing man as he is.

Id., at 46 and 47.

It truly would be a unique determination in a free society to conclude that performance dance is devoid of constitutional protections because the public, or even art critics, may not perceive or understand (or disagree with) the artists' "message," purpose or intent. This Court has never denied constitutional protections to art forms on the simple basis that some, or most may not perceive a "particularized message."

2. Even if applicable, nude performance dance is protected speech under *Spence* and *Johnson*.

Even assuming, arguendo, that a *Spence* analysis would apply to performance dance, the evidence below establishes such a test to have been met. Gayle Sutro's affidavit indicates that her dance performances were "appropriately choreographed and are *an attempt to communicate* as well as to entertain." (J.A. 14) (emphasis added). Thus, the "intent" requirement is fulfilled. The state, however, argues that Gayle Sutro "never revealed *what she wanted to communicate*" (and thus being fatal to her fulfilling the first part of the *Spence* test (Pet. Br. 17)). The state is in error, for it is the dance performance itself, consisting of its constituent emotion, intensity, and visual display, that is the "message."

To inquire further is to ignore the emotive component in art noted by this Court in *Ward*, which is not necessarily adaptive to a particular verbal description. If required to do so in *Ward*, this Court might well have had great difficulty in

articulating the "particularized message" of the rock music that it found to be constitutionally protected expression there. In addition, as noted by Judge Flaum in the majority opinion of the Seventh Circuit below, it is reasonably apparent that this message would be understood, as those who view the respective dances "advance currency to view them." *Miller* (*En Banc*), 904 F.2d at 1087 (Pet. App. at 12). Therefore, even if this Court finds a *Spence* analysis to be applicable to art, the record below illustrates that this test has been met here.

II.

THE INDIANA PUBLIC INDECENCY STATUTE IS UNCONSTITUTIONAL AS APPLIED TO THE PERFORMANCE DANCE OF THESE RESPONDENTS.

A. IF UPHELD TO PRECLUDE THE PERFORMANCE DANCE AT ISSUE, THE INDIANA PUBLIC INDECENCY STATUTE WOULD EFFECTUATE A TOTAL BAN ON CONSTITUTIONALLY PROTECTED EXPRESSIVE NUDITY.

The state argues that even if the performance dance here at issue is expression of a type protected by the First Amendment (and therefore falls within the *Baysinger* exception), the Indiana public indecency statute is nonetheless constitutionally valid as applied, as being either a content-neutral time, place, or manner regulation, or as a facially neutral statute incidentally limiting First Amendment rights.[16] This argument is a non-sequitur, however, as it not only ignores,

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[16] As these issues were never raised by the state either in its pleadings or various arguments below, they are deemed waived. See Judge Posner's concurring opinion (slip opinion p. 44-45). Since the Seventh Circuit's own decisions make it clear that an issue not raised is waived, *United States v. Rodriguez*, 888 F.2d 519, 524 (7th Cir. 1989), it is difficult to argue that the Seventh Circuit erred by following its own precedent in declining to substantively address these issues. In addition, this Court has indicated the impropriety of considering issues never raised or addressed below. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2 (1970); *FW/PBS v. Dallas*, 493 U.S. ___, 107 L.Ed.2d 603, 617 (1990), citing *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (per curiam).

but, in fact, directly contradicts the position taken by the state in the lower courts and which it asserts here; that being, that the limiting construction by the Indiana Supreme Court in *Baysinger* construes the statute (in order to save it from being struck down as facially overbroad) so that it does *not* apply to an expressive performance which should be, and is, otherwise protected by the First Amendment.[17]

What the state fails to recognize is that its foundational presumption to discuss whether the questioned statute could be constitutionally applied under either of the legal theories (i.e., that Respondents' performance dance is " 'expressive' and therefore entitled to some protection as speech under the First Amendment . . . ", Pet. Br. 26), consequently also presumes that the Respondents' conduct falls within the *Baysinger* exception. Yet, having made those concessions, the state asserts that nude or semi-nude performance dance should *still* be able to be precluded under the public indecency statute, by considering that statute as either a time, place or manner regulation or a facially neutral statute.

To accept application of one or both of these legal tests to these circumstances is, however, to effectively overrule the *Baysinger* exception. For if the constitutionality of the statute is upheld by this Court under either of these arguments

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[17] Of course, to the extent that this Court would construe a proscription of nudity across the board as being a constitutionally valid statute (under any legal theory), there would be no legal impediment to governmental entities across the country expanding the proscription of "live" nudity to include a proscription of nudity of any kind, including that appearing in films, books and magazines. Indeed, the state argued below, as noted in Judge Posner's concurrence, that it could apply its public indecency statute to the public display (as defined in *Baysinger, supra*) of videotapes of the dance performances at issue, such as the videotape submitted by the Darlene Miller Respondents (Supplement to Joint Appendix). *Miller* (*En Banc*), *supra*, at 1103-1104 (Pet. App. 45-46) (the state apparently now recants from this position – see Pet. Br. 23). This marked extension would destroy the stringent protections to be afforded presumptively protected material as set forth by this Court's numerous decisions in the area of obscenity, and would render meaningless this Court's repeated observations that nudity alone does not serve to deprive material of its otherwise existing constitutional protections.

asserted by the state, *Baysinger* will fail to carry any continuing validity. Nudity will be prohibited in *any* "public place" (as broadly defined by the Indiana Supreme Court in *Baysinger, supra*), even in a context where it may be part of some "larger form of expression of ideas." This result is inevitable, since, if this Court finds the performance dance here to be protected "expression," which it must, or at least assume, for consideration of either of these tests, then performance dance properly falls within the *Baysinger* exception, and should be exempted from prosecution under the public indecency statute pursuant to the state court's limiting construction. However, allowing application of the statute to this otherwise properly protected expression (by either of the legal theories now asserted by the state) leaves the *Baysinger* exception meaningless.[18]

This result would have two impermissible effects. First, the state court's authoritative construction of one of its own statutes will have been voided. As this Court has long noted, it is the duty of this Court to accept state judicial construction of their own (state) laws. *Shuttlesworth v. City of Birmingham, supra*, at 91, and cases cited therein. By removing the scope of the *Baysinger* exception, this Court destroys the protections afforded by the state court limiting construction. Similarly, both the district and circuit courts below properly construed the state court's limiting construction in *Baysinger*. See, for example, n. 4, *supra*. This Court has noted its deference to statutory construction interpretation by the lower federal courts.

> Following our normal practice, "we defer to the construction of a state statute given it by the lower federal courts . . . to reflect our belief that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.* 472

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[18] It is for this reason, most likely, that these issues were never raised by the state in the lower courts; it being implicit that if the performance dance at issue was expression, the public indecency statute could not constitutionally be applied to it. See n. 4, *supra*.

> U.S. 491, 499-500, (1985). See *Virginia v. American Booksellers Assn.*, 484 U.S. 383, 395 (1988), ('This Court rarely reviews a construction of state law agreed upon by the two lower federal courts').

Frisby v. Schultz, supra, at 482 (clarification added). This Court should not usurp the proper interpretation made by the federal courts below, let alone abrogate state court construction.

Second, without the *Baysinger* exception, the Indiana public indecency statute would suffer from the same unconstitutional defect as found by [now Chief] Justice Rehnquist in *Doran, supra*:

> The District Court observed, we believe correctly:
>
> > "The local ordinance here attacked not only prohibits topless dancing in bars but also prohibits any female from appearing in 'any public place' with uncovered breasts. There is no limit to the interpretation of the term 'any public place.' It could include the theater, town hall, opera house, as well as a public market place, street or any place of assembly, indoors or outdoors. Thus, this ordinance would prohibit the performance of the 'Ballet Africains' and a number of other works of unquestionable artistic and socially redeeming significance."

Id., at 933, citing *Salem Inn, Inc. v. Frank*, 364 F.Supp. 478, 483 (E.D. N.Y. 1973).

The effect of such an analysis here (allowing application of a "time, place, or manner" or "neutral statute" theory in consideration of the constitutionality of the questioned statute), would be to allow the preclusion of nudity at all times, in all public places, and under all circumstances (as was the case in *Doran, supra*), thereby prohibiting nudity, in the words of Judge Posner "across the board . . . ". *Miller* (*En Banc*), *supra*, at 1103 (Pet. App. 44). The result would be unquestionable facial overbreadth of the statute.[19] As this

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[19] This should not be construed to disparage or to ignore Respondents' asserted position in this litigation for the past five years, that, notwithstanding any

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Court has long noted, when First Amendment rights are implicated, "[p]recision of regulation must be the touchstone . . . ". *Interstate v. Dallas*, 390 U.S. 676, 682 (1968), citing *NAACP v. Button*, 371 U.S. 415, 438 (1963). The statute would, therefore, just as easily apply to the stage production of "Hair" or any other play or performance that should properly fit within the *Baysinger* exception, and would allow for a total restriction of nudity regardless of any "expressive" purpose.

This Court should give proper constitutional deference to the Indiana Supreme Court's limiting construction of the public indecency statute, and not usurp the function of the state's highest appellate court to construe its own statutes. To void the Indiana limiting construction would result in a hopelessly overbroad statute.

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construction by the Indiana Supreme Court in *Baysinger, supra*, the Indiana public indecency statute is overbroad *on its face*. Indeed, the district court below, in its initial decision on the Glen Theatres matter found the statute to be facially overbroad. *Glen Theatre, Inc. v. Civil City of South Bend*, 728 F. Supp. 728 (N.D. Ind. 1985). The Seventh Circuit, in its first decision, reversed, finding that this Court's dismissal of *Baysinger* for want of a substantial federal question in *Clark* and *Dove, supra*, bound the federal courts to a determination that the Indiana public indecency statute was not overbroad on its face. The circuit court, however, remanded for the consideration of whether the statute was overbroad *as applied* to the performance dance here at issue. *Glen Theatres Inc. v. Pearson, supra*, at 789-791. (Pet. App. 146-147). Yet, a simple examination of the statute reveals that it is, unquestionably, facially overbroad, in that it allows criminalization of dress that falls far short of total nudity, and applies in circumstances that clearly are not properly subject to criminal proscription. For example, a woman wearing a thong bikini on a beach, which does not "totally" cover the buttocks, is a criminal act. A model in an art class at a University, if totally nude or "nude" within the statute, can be prosecuted. A male dancer in a ballet, wearing tights in which his genitalia may be in a "discernably turgid state" can be prosecuted, even though *fully* and opaquely dressed, and, of course, anyone caught nude (as statutorily defined) in the local Y.M.C.A. shower had better seek out legal counsel immediately. As this issue was raised below, and as Respondents may assert proper theories to support affirmance of the decision below, *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940); *Dandridge v. Williams*, 397 U.S. 471, 475-76 n. 6 (1970), these Respondents do not waiver from their initial contention that the Indiana public indecency statute is overbroad on its face, and is therefore unconstitutional.

B. INDIANA'S PUBLIC INDECENCY STATUTE DOES NOT QUALIFY AS A CONTENT-NEUTRAL REASONABLE TIME, PLACE OR MANNER REGULATION

1. This statute is not content-neutral.

In its application to expression, the Indiana public indecency statute specifically prohibits that component of expression which may be considered "nudity" as defined in the statute. The evidence below substantiates that nudity and the removal of clothing was an "integral part" of Gayle Sutro's dance performances. J.A. 14. As this Court has noted, the "principle inquiry in determining content neutrality" is whether the government has adopted a regulation "because of disagreement with the message it conveys." *Ward, supra*, at 675, citing *CCNV, supra*, at 293. In evaluating this concern, the "government's purpose is the controlling consideration." *Ward, supra*, at 675. "Content-neutral" restrictions are those that "are *justified* without reference to the *content* of the regulated speech." *Boos v. Barry*, 485 U.S. 312, 320 (1988), citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (emphasis in original and emphasis added).

The justification for the statute here is quite simple; it is to *totally preclude "public nudity,"* a concept that the state finds to be offensive. It would, of course, however, be incredulous to argue that the statute is content neutral if it applies to some nude dancing, but not to other such performances. Yet, while this statute facially appears to apply to *all* public nudity (and thus all "public" nude dancing), as construed by the Indiana Supreme Court, the public indecency statute has quite a different result. Under the *Baysinger* construction, the statute does not apply to "nudity as part of some larger form of expression meriting protection . . . ". *Baysinger, supra*, 397 N.E.2d at 587. Therefore, it would not arguably apply to nude dancing as part of a ballet or theatrical production. The state acknowledges such. Pet. Br. 22, 24-25. The state does seek, however, to apply this statute to the nude and semi-nude

dance at issue here. There can be no other conclusion, therefore, but that the statute discriminates among nude dancing *specifically* on the basis of the *content* of a performance. As such, it is *not*, by definition, content-neutral. If a dance is performed in a context in which the state finds agreeable, it will not be prosecuted. However, if the state disagrees with the content of the performance, it will not be protected.

This Court has consistently indicated that offensiveness of, or disagreement with expression is not a valid basis to revoke otherwise presumptive First Amendment protections. *Texas v. Johnson, supra*, 105 L.Ed.2d at 360; *Erznoznik, supra*, at 209; *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 71 (1983), citing *Carey v. Population Services International*, 431 U.S. 678, 701 (1977).

In *Erznoznik, supra*, this Court considered the facial validity of a Jacksonville, Florida ordinance that prohibited drive-in movie theatres, without proper screening, from showing films that "contained *nudity*." *Erznoznik, supra*, at 206 (emphasis added). This ordinance, the Court found, discriminated among movies "solely on the basis of *content*."[20] *Id.*, at

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[20] As a footnote to this observation (*Erznoznik, supra*, at 211 n.7), this Court noted that scenes of nudity in a movie were different from public nudity "traditionally subject to indecent-exposure laws", as the nudity in a film must be considered as part of the whole work. In this case, there is no evidence of mere simple "public nudity," but, rather, nudity as an "integral part" of communicative dance performances that are appropriately choreographed. Jt. App. 14. Therefore, the nudity in question here, as was the case in *Erznoznik*, must be similarly "considered as part of the whole work." In addition, the *Erznoznik* footnote cites to a statement by Justice Douglas in dissent in *Roth v. United States*, 354 U.S. 476 (1957), where he opined that "[n]o one would suggest that the First Amendment permits nudity in public places." The state (Br. 23) and *amici* (see, for example, Brief of American Family Assn. et al., at p. 5) rely upon this statement for the general assertion that *even* Justice Douglas, one of the most absolutists on this Court regarding First Amendment rights, would not contend that "public" nudity is protected. However, it is clear from Justice Douglas' opinions that his position was predicated upon the common definition of the term "public place," such as on a street corner, not the all-encompassing definition adopted in Indiana. See, for example *La Rue, supra*, at 121 (Douglas J., dissenting), and *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 563 (Douglas J., dissenting in part).

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211 (emphasis added). The statute at issue discriminates in the same fashion, by precluding, as construed, particular live dancing that contains, as part of its content, nudity. As this Court noted in *Erznoznik*:

> [A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, *or its content*. . . . Thus, 'under the Equal Protection Clause, not to mention the First Amendment itself,' . . . *even a traffic regulation* cannot discriminate on the basis of *content* unless there are clear reasons for the distinctions.

Id., at 215 (emphasis added, citations omitted).

As the majority opinion of the Seventh Circuit below noted, the stated purpose (by Indiana) of the public indecency statute was the protection of "public morality generally, and the family structure in particular." *Miller (En Banc)*, *supra*, at 1088 (Pet. App. 14). The court then concluded:

> In meeting this intended goal, the statute directly restricts activity in the context of this case precisely because it expresses a particular message contrary to the legislature's proscribed vision. As such, it is *directly* related to the suppression of free expression.

Id., at 1088 fn. 7 (Pet. App. 14-15 fn. 7) (emphasis in original).[21]

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Therefore, it is misleading to imply that the statement of this Court in the *Erznoznik* footnote regarding the limitation of public nudity "*traditionally* subject to indecent – exposure laws" is applicable in these circumstances.

[21] This is not, necessarily, to say that a state may not legislate on the basis of morality. Note, although, *Kingsley International Pictures Corp. v. Regents of the University of the State of New York*, 360 U.S. 684, 688-689 (1959). However, such an observation adds nothing to the consideration of whether a specific regulation may be "content-neutral," when it seeks to regulate or preclude *expression* (or a hybrid of expression and conduct), as opposed to *pure* conduct, on the basis of normative moral judgments.

In addition, the "governmental interests" asserted by the state *here* (in support of the public indecency statute) similarly illustrate that this statute cannot be analyzed as a "content-neutral" regulation. Again, the state recites the interest of the "public morality," including the "discouragement of adultery and divorce" (Pet. Br. 31), and, since those governmental interests did not prevail in the Seventh Circuit, the state further raises, for the first time,[22] the interests as noted by Judge Coffey in his dissent below including:

> Public nude *dancing* is damaging to society and citizens by *degrading women as sex objects, encouraging prostitution, increasing sexual assaults, and attracting other criminal activity.*

Pet. Br. 37 (emphasis added).[23]

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[22] As noted previously (n. 16, *supra*), since not raised below, these arguments are deemed waived. In addition, it is of no assistance to rely upon, as does the state here, "*possible*" legislative reasons that Judge Coffey believed "should be self-evident to an educated man or woman." Pet. Br. 31. As addressed above, in determination of content neutrality, "the government's purpose is the controlling consideration." *Ward*, *supra*, at 675. Thus, content-neutrality is not to be determined on the basis of *any "possible"* governmental interest, not particularly expressed, but, rather, is evaluated against specifically articulated concerns that served as the underlying basis for the statute. This Court should quickly question the importance or necessity of any governmental interest that the state itself has never before asserted. Indiana appears to be "throwing everything against the wall, hoping something will stick."

[23] Of course, none of these concerns find any support in the record, whatsoever. In fact, the affidavit of Roger Judd filed below notes that, to his knowledge, "no person has been arrested at the Chippewa Bookstore for any criminal act other than a violation of Indiana's Public Indecency Law, I.C. 35-45-4-1, with the exception of one patron who was arrested for burglary." J.A. 16-17. It is also of interest that the state argues over and over again, that this statute is not particularly directed to either nude expression or nude dancing, but, rather, only to the neutral consideration of *nudity itself* (Pet. Br. 28-31). The state argues this, of course, so as to not run afoul of this Court's stringent prohibitions of content-based regulations. It is therefore somewhat quizzical to ponder as to how *mere nudity* that is normally subject to the indecent exposure laws, "such as public urination" (*Miller (En Banc)*, *supra*, at 1090 (Posner, J., concurring) (Pet. App. 19)), would be "degrading women as sex objects, encouraging prostitution, and increasing sexual assaults, and attracting other criminal activity." Judge Coffey, in dissent, apparently attempts to read into the statute a particular purpose for limiting *nude performance dancing* that the state vehemently argues is *not* the intended goal of the statute to so single out.

These governmental interests all presume a negative *impact* of *performance dance* on the *viewer*. As this Court recently noted:

> Regulations that focus on the direct impact of speech on its audience present a different situation [from the "secondary effects" argument as found in *Renton v. Playtime Theatres, Inc.*, 475 U.S. 431 (1986)]. Listeners' reactions to speech are not the type of "secondary effects" we referred to in *Renton*. To take an example factually close to *Renton*, if the ordinance there was justified by the city's desire to prevent the *psychological damage* it felt was associated with viewing adult movies, that analysis of the measure as a *content-based statute would have been appropriate*. The hypothetical regulation targets the *direct impact* of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Boos, supra, at 321 (clarification and emphasis added).

Thus, if the governmental interests asserted by the state are directed at the *impact* of the performances upon their audience (which, given the state's reliance upon Judge Coffey's position, they appear to be), the statute may not be analyzed as "content-neutral," but, rather, must be considered to be a content-specific regulation.[24] Such a content-specific

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[24] The state argues in its brief that "[t]hese interests are 'unrelated to the suppression of free expression,' unless the right to express an 'emotional theme of eroticism and sensuality' includes the right to *advocate adultery*, licentiousness, prostitution, and other crime." (Pet. Br. 37) (emphasis added). However, this Court has noted that the Constitution does, indeed, protect "advocacy of the opinion that *adultery* may sometimes be proper, no less than advocacy of socialism or the single tax." *Kingsley International, supra*, at 689 (emphasis added). Of course, it can be argued that advocacy is one thing, but actual conduct (albeit expressive) is quite another. For example, these Respondents would never contend that any dance performance could contain certain other conduct that could be otherwise prosecuted under the criminal code, such as actual sex acts, rape, or even murder, simply because they are in the context of an "expressive" performance. Clearly, the overriding governmental interests in the protection against this type of conduct occurring *anywhere*, including even in an artistic performance, outweigh any asserted First Amendment right. However, this Court has consistently noted that

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statute, to pass constitutional muster, must be necessary to a compelling governmental interest. For the reasons as set forth in Section II(D), *infra*, the Indiana public indecency statute fails that test as well.

2. Even if content-neutral, the Indiana public indecency statute is not a valid reasonable time, place or manner regulation.

Assuming, arguendo, that the statute in question can be considered to be "content-neutral," that observation, in and of itself, does not equate to constitutionality. In addition to being "justified without reference to the content of the regulated speech," to pass constitutional muster, a time, place or manner regulation must be "reasonable" in that it must be "narrowly tailored to serve a significant governmental interest", and must "leave open ample alternative channels for communication of the information." *Ward, supra*, 105 L.Ed.2d at 675, citing *CCNV, supra*, at 293. This statute fails in both respects, and is thus unreasonable.

As noted by this Court, a regulation is narrowly tailored if it "promotes a substantial government interest that would be achieved less effectively absent the regulation." *Ward, supra*, at 680, citing *United States v. Albertini*, 472 U.S. 677, 689 (1985).

While this Court has noted that a "least restrictive means" analysis is not required in such circumstances, it has been added, however:

> To be sure, this standard does not mean that a time, place or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interest. Government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.

Ward, supra, at 681.

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simple nudity has no such overriding governmental interest, as nudity alone will not deprive expression of its presumptive constitutional protection. *Schad, supra*, at 66, and cases cited therein.

In addition, the regulation at issue is not merely a "time, place or manner regulation," but, rather, works to be a total prohibition. "A complete ban can be narrowly tailored, but only if each activity within the proscription's scope is an appropriately targeted evil." *Frisby*, *supra*, at 485. From this Court's observations that not all nudity, *even to minors*, can be prohibited, *Erznoznik*, *supra*, at 213, it seems ridiculous to argue that it is necessary to ban *all* nudity in order to preclude whatever may be considered to be the alleged "appropriately targeted evil."

It is, of course, helpful in this consideration to leave the area of *speculation* of the "appropriately targeted evil," and to consider, reasonably, what may have been the *actual* purpose of the public indecency statute. Corpus Juris Secundum notes the purpose of "indecent exposure" laws to be "to protect the public from shocking and embarrassing displays of sexual activity . . . ". 67 C.J.S. *Obscenity* § 10, at 49-50 (1978). It is, therefore, to protect the *unconsenting* public from conduct that may be offensive to them.[25]

However, given the Indiana Supreme Court's interpretation of the statute, it is questionable whether the statute is even *related* to the governmental interests raised (or the more reasonably argued interest to protect the unconsenting public), let alone whether those governmental interests would be achieved less effectively absent the regulation. Because of the *Baysinger* exception, a theatrical performance, such as the Dance of the Seven Veils in Strauss' *Salome*, including full nudity, could be displayed in *any public place*, including areas that may effect both the unwanting public and minors, such as on a street corner. Given this exception, it is difficult to understand how "public morality" or the other asserted or implied governmental interests could be served by allowing

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[25] In fact, the indecent exposure statute of the State of Arizona allows prosecution *only* in such circumstances where the defendant is reckless about whether other persons "would be offended or harmed by the act." A.R.S. § 13-140(A). It is, therefore, somewhat ironic that the State of Arizona would file an *Amius* brief in this matter, since the circumstances at issue here, where the performances are limited to a *consenting* audience, would not violate Arizona law.

such a display under those circumstances, while precluding an expressive dance performance that was restricted to a consenting adult audience that was performed indoors.

Indeed, in considering the constitutionality of an ordinance that banned all picketing, with the exception of labor picketing, this Court has noted that "[i]f some groups are exempted from a prohibition on parades and pickets, *the rationale for regulation is fatally impeached.*" *Carey v. Brown*, 447 U.S. 455, 465 n. 9 (1980), citing *Young v. American Mini Theatres, Inc.*, *supra*, at 67 n. 27 (opinion of Stevens, J.), quoting Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 Sup. Ct. Rev. 1, 29 (emphasis added). Similarly, here, because of the exceptions to the statutory proscription of nudity not only required by *Baysinger*, but also admitted by the state as to the selective enforcement of the statute (exempting from prosecution what the state perceives to be "legitimate" art-discussed *infra*), the rationale for the regulation becomes "fatally impeached," and the public indecency statue is, thus, not narrowly tailored.

Nor does the statute leave open "ample alternative channels for communication." The statute is an outright, total prohibition, and the *content* of the performance is clearly different without the element of nudity. Nude performance dancing (or performance dance that contains some nudity) simply cannot be performed *without nudity*.

The state argues, however, that the public indecency statute does not unreasonably limit alternative avenues of communication because "any alleged 'erotic message' of the barroom dancer can be communicated just as effectively in scanty apparel as total nudity. The plaintiffs in this case have never asserted otherwise." Pet. Br. 40.

First, the state argues no basis for its conclusion that the message can be communicated "just as effectively" in clothing as in the nude. Gayle Sutro's affidavit, in fact, indicates quite to the contrary. J.A. 14. In addition, a simple example shows the fallacy of this statement. It would be difficult to deny that the content of the expression of "message" as found in Michelangelo's David would not be markedly different with a governmentally required loin cloth over

the abdominal area of the statue. It is, in part, the controversy over the nudity as contained within the figure itself that has engendered such debate and interest of the sculpture throughout the centuries.

Second, it is somewhat disingenuous for the state to argue that the Plaintiffs had never "asserted otherwise," since the state had never *raised* the application of this legal analysis (a "reasonable time, place or manner restriction") either as an asserted defense in its pleadings, or in its numerous briefs and arguments to the district and circuit courts below.

The State's assertion that the public indecency statute is a mere "manner" regulation is similarly unavailing. As noted above, it is not the "manner" that is being regulated (as was the case in *Ward, supra* [volume of rock music], or *Kovacs v. Cooper*, 336 U.S. 77 (1949) [sound trucks]), but it is rather a prohibition of particular *content*.

> [The government may not] proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed* at the *communicative nature* of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment requires."

Texas v. Johnson, supra, 105 L.Ed.2d at 355, citing *CCNV v. Watt*, 703 F.2d 586, 622-623 (D.C. Cir. 1983) (Scalia, J., dissenting), rev'd sub nom. *Clark v. CCNV, supra* (emphasis and clarification in original and added).

In addition, in evaluating the reasonableness of a manner regulation, it must be determined whether the expression is "basically incompatible with the normal activity of a particular place at a particular time." *City of Lakewood v. Plain Dealer Publishing Company*, 486 U.S. 750, 763 (1988), citing *Grayned v. Rockford*, 408 U.S. 104, 116 (1972). Not only is the performance dance at issue here not "basically incompatible" with the normal activity of Respondents' business establishment, it is, rather, *particularly appropriate* there. As the record establishes, the Chippewa Bookstore is totally

enclosed, and limited to consenting adult patrons. 695 F.Supp. 414, at 419 (Pet. App. 131). The type of performance dance involved here is most appropriate in such a setting that serves a governmental interest in precluding nude performance dancing from being viewed by or cast upon minors or the unconsenting public.

Finally, this Court has long held that time, place and manner regulations are invalid if they invite arbitrary application as a means of suppressing particular expression. *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 649 (1981), and cases cited therein. If a statute vests such broad discretion in public officials that allows the government to determine which expression will be permitted and which will not, the result is to sanction "a device for the suppression of the communication of ideas and permits the official to act as censor." *Cox v. Louisiana*, 379 U.S. 536, 557 (1965). In addition to violating the First Amendment, such arbitrary discretion similarly affronts the equal protection clause of the Fourteenth Amendment. *Id.* The remarks of the state below leave no question but that application of this statute, if constitutionally validated as a reasonable time, place or manner regulation, would be left to the unfettered, and more importantly, standardless discretion of the government.

As pointed out by Judge Posner, at argument before the *En Banc* panel of the Seventh Circuit, the state asserted that the application of the *Baysinger* exception was to only "'established' works of art". *Miller* (*En Banc*), *supra*, at 1098, 1104 (Pet. App. 34, 45-46). Therefore, the State of Indiana seeks to discriminate among expressive art based upon its *own* standardless and arbitrary conception as to what *the state itself* may consider to be "legitimate," or, more particularly, "established" art. Even belly dancing, the state argued below, could be banned because, as observed by Judge Posner, it is "not certified high art." *Miller* (*En Banc*), *supra*, 904 F.2d 1104 (Pet. App. 46). The discriminatory enforcement is further supported by the affidavit of Sergeant Timothy J. Corbett, who averred: "No arrests have ever been made for nudity as part of a play or ballet." J.A. 18-19.

Thus, to uphold the constitutionality of this statute is to allow the state to apply the public indecency law of Indiana in the very manner that the state desires; at the subjective, standardless, and unfettered discretion of prosecutorial authorities who may themselves determine what is "established" or "legitimate" art. As noted in *Heffron* (and the cases cited therein), such circumstances are unquestionably unconstitutional.

Therefore, even if the Indiana public indecency statute can be considered to be "content-neutral," it fails to comply with the other constitutional requirements to be a reasonable "time, place or manner" regulation.[26]

C. THE PUBLIC INDECENCY STATUTE IS NOT A VALID LAW OF GENERAL APPLICABILITY, ONLY INCIDENTALLY AFFECTING FIRST AMENDMENT RIGHTS.

If not a content-neutral time, place or manner regulation, the state asserts that the Indiana public indecency statute is a

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[26] The state also relies upon this Court's four-part test as set forth in *United States v. O'Brien*, *supra*, in support of a legal theory to uphold the constitutionality of this statute. Pet. Br. 27, 35-38. That test is set forth at page 36 of the state's brief, and need not be repeated here. As noted by this Court, the *O'Brien* test "in the last analysis is little, if any, different from the standard applied to time, place or manner restrictions." *CCNV*, *supra*, at 298. Therefore, for the reasons in this subsection above that establish that the Indiana public indecency statute is not a reasonable time, place or manner regulation, this statute cannot be saved by an *O'Brien*-type analysis. In addition, in *O'Brien*, this Court noted that a "sufficiently important governmental interest" in regulating the non-speech element (there, burning draft cards), can, under some circumstances, justify the incidental limitations on First Amendment freedoms. *O'Brien*, *supra*, at 376-377. *O'Brien*, however, dealt with conduct that was not implicitly integral to the expression. Here, however, the nudity is "intimately related to expressive conduct" in that it is an integral part of the dance performance and the expression therein, and, as such, cannot be sustained upon an *O'Brien* type analysis. *Arcara v. Cloud Books*, 478 U.S. 697, 706 n. 3 (1986), and cases cited therein, and at 709-711 (Blackmun, J., dissenting). Even if the nudity involved herein can be considered to be some type of separable "non-speech" element, this Court has repeatedly indicated that that factor (nudity), by itself, will not take otherwise protected expression (here, performance dance) out of the mantle of the First Amendment. *Schad*, *supra*, at 66. This Court has noted no such qualifications for burning draft cards as was the case in *O'Brien*.

constitutionally valid criminal law of general applicability, only incidentally affecting First Amendment rights, citing *Employment Division v. Smith*, 494 U.S. ___, 108 L.Ed.2d 876 (1990). As *Smith* is a "free exercise" decision of the *religion clauses* of the First Amendment, it is inapplicable to the consideration of the issues before this Court. In fact, this Court noted in *Smith* that "neutral generally applicable" laws affecting free exercise of religion *have been invalidated* when challenges have also been predicated upon the free speech and press clauses of the First Amendment. *Smith*, *supra*, 108 L.Ed.2d at 887. However, a neutral statute analysis may, under the proper circumstances, be applied in the freedom of speech context as well. *CCNV*, *supra*.

The cases relied upon by the state, however, have one, although important, distinction from the case at issue. They all involve the government's ability to control the use of its own property. In *CCNV*, this Court was concerned with a park service regulation that prohibited camping in certain of its parks. In *Albertini*, *supra*, the issue involved the government's ability to preclude certain speech on a military base. Similarly, in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, *supra*, the complete ban allowed there was narrowly tailored as it only banned signs on "public property."

As stated in a slightly different context, the government's "attempt to restrict free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interest of a government in overseeing the use of its property." *Consolidated Edison Company v. Public Service Commission of New York*, 447 U.S. 530, 540 (1980). This is so because "[i]t is a long-settled principle that governmental actions are subject to a lower level of First Amendment scrutiny when . . . " the government acts as proprietor "to manage [its] internal operation[s] . . . ". *United States v. Kokinda*, 497 U.S. ___, 111 L.Ed.2d 571, 580 (1990) (plurality opinion), citing *Cafeteria and Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961) (clarification in original and added).

In addition, none of the cases cited have the effect of being a total, all encompassing ban of certain expression at all times, in all circumstances, and in all places. Application of this legal doctrine to these circumstances would have just that effect. Even in *Frisby v. Schultz*, *supra*, (cited by *amici* National Governor's Association et al. [Br. 25] for the proposition that a "complete ban" could be narrowly tailored so as to allow the constitutional application of this legal theory to totally prohibit speech), there were alternative channels of communication available, as the picketing under the regulation there, as construed, was limited only to conduct "taking place solely in front of a particular residence." *Id.*, 101 L.Ed.2d at 431. Picketing was not prohibited in other circumstances. Therefore, application of this legal theory to this case is inappropriate.[27]

D. THE CONSTITUTIONALITY OF THE INDIANA PUBLIC INDECENCY STATUTE MUST BE EVALUATED PURSUANT TO STRICT SCRUTINY.

For the reasons set forth above – that the Indiana public indecency statute is neither a reasonable content-neutral time, place or manner regulation nor a neutral criminal statute only incidentally affecting First Amendment rights – and since the

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[27] The state also implies (Pet. Br. 17), and *amici* American Family Association, Inc., et al. argues (Br. 15-17) that the dance performance at issue here was for a commercial purpose, and therefore should be analyzed under a lower level of scrutiny as is appropriate to "commercial speech." However, this argument confuses speech that may make a profit with "commercial speech." This Court has long held that profit motive makes no difference in First Amendment analysis. *Joseph Burstyn, Inc., supra*, 501-502. The setting of a bookstore or commercial theatre are presumptively protected under the First Amendment. *Roaden v. Kentucky*, 413 U.S. 496, 504 (1973). See also *Heffron*, *supra*, at 647, and cases cited therein. The cases cited by *amici* relate to *advertising*, or more particularly, as phrased by this Court, speech "proposing a commercial transaction." *Bolger v. Youngs Drug Products Corp.*, *supra*, at 64. The speech and expression at issue here was not any proposition of or for a commercial transaction, and, therefore, does not fit within this Court's category of "commercial speech." To accept *amici's* argument would be to lower the level of scrutiny of any speech or expression for which monetary compensation may be paid to receive, including every movie, video, and book. Such an argument is clearly ludicrous.

state has asserted no other basis upon which to consider this statute under an intermediate level of scrutiny, First Amendment (strict) scrutiny should be utilized to evaluate the constitutionality of this statute. *Sable Communications*, *supra*, 106 L.Ed.2d, at 105.

Under such scrutiny, "an absolute prohibition on a particular *type* of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest." *United States v. Grace*, 461 U.S. 171, 177 (1983), citing *Perry Education Assn. v. Perry Local Educators' Assn.*, *supra*, at 46 and *Widmar v. Vincent*, 454 U.S. 263 (1981) (emphasis added). Thus, the regulation must be "necessary" to serve a "compelling" state interest. *Perry*, *supra*, at 45 and *Boos*, *supra*, 99 L.Ed.2d at 345. In addition, "narrow tailoring" in a strict scrutiny analysis requires this Court to determine whether the regulation is the "least restrictive means" available to accomplish the compelling governmental interest. *Boos*, *supra*, at 329, citing *Wygant v. Jackson Bd. of Ed.*, 476 U.S. 267, 280 n. 6 (1986) (plurality opinion); *Sable Communications*, *supra*, 106 L.Ed.2d, at 105. For the reasons that the questioned statute does not pass constitutional muster under an intermediate level of scrutiny – that is, that it does not *serve* a *substantial* governmental interest (see Section II(B)2, *supra*) – this criminal proscription is obviously not *necessary* to a *compelling* governmental interest.

In addition, the government may surely constitutionally impose less restrictive regulations based upon whatever governmental interest it may assert. For example, the government could restrict nudity outdoors or, under the appropriate circumstances, where it could be seen by minors, predicated upon the overriding governmental interest of the protection of the unconsenting public and minors. In addition, the government can outlaw [and it has] that nudity that may be obscene. I.C. § 35-49-3-1 through 35-49-3-3.

E. THE TWENTY-FIRST AMENDMENT HAS NOT BEEN RAISED, DOES NOT APPLY, AND, IN ANY EVENT, IS INAPPLICABLE TO THE GLEN THEATRE RESPONDENTS.

The State of Indiana has not raised, in support of the constitutionality of its indecent exposure statute, the state's inherent power pursuant to the Twenty-First Amendment. See *La Rue, supra*. However, acknowledging that this Court may address issues that have not been raised, briefed, or argued relative thereto, *Acosta v. Louisiana Dept. of Health and Human Resources*, 478 U.S. 251 (1986) (Marshall, J., dissenting), Respondents would note that this Court has thus far refused to extend Twenty-First Amendment-*La Rue* type analysis to statutes or ordinances that are not specifically alcohol regulations.

Clearly, the Indiana public indecency statue is not a statute directed at the regulation of alcohol, and is not so limited in its scope. It prohibits all nudity in any "public place", as so defined. However, the recent Eighth Circuit decision of *Walker v. City of Kansas City*, 911 F.2d 80 (8th Cir. 1990), reh'g *En Banc*, denied, ___ F.2d ___ (8th Cir. 1990), together with the district court's decision in the Miller matter below, upholding the constitutionality of the public indecency statute on Twenty-First Amendment grounds (Pet. Br. 4), calls this limitation into question.

Even assuming that this Court extends state's rights under the Twenty-First Amendment, pursuant to *La Rue* and *Bellanca, supra*, and *City of Newport, Kentucky v. Iacobucci*, 479 U.S. 92 (1986), to justify this public indecency statute, at least as applied to alcohol regulated establishments, the constitutional claim of these Respondents would be unaffected by this conclusion; for the Chippewa Bookstore does not serve or permit alcoholic beverages on the premises.

Accordingly, while this Court may extend the authority of the state pursuant to the Twenty-First Amendment so as to validate the constitutionality of this statute, such construction could not, in any event, apply to claims of the Glen Theatre Respondents.

CONCLUSION

The Judgment and opinion of the Seventh Circuit, *En Banc*, should be affirmed.

Dated: December 19, 1990

Respectfully submitted,

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